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Supreme Court, U. S.

F I L E D

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No. 95-1766

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 199⁵

LAW PRACTICE OF J.B. GROSSMAN, P.A., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE SECURITIES AND
EXCHANGE COMMISSION IN OPPOSITION**

RICHARD H. WALKER

General Counsel

PAUL GONSON

Solicitor

RICHARD M. HUMES

Associate General Counsel

LAURA S. PRUITT

Senior Counsel

Securities and Exchange

Commission

Washington, D.C. 20549

WALTER DELLINGER

Acting Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 514-2217

15 PP

QUESTION PRESENTED

Whether the district court correctly held petitioner in civil contempt for violating a temporary restraining order (TRO) that was extended a few days past the 20-day time limitation of Federal Rule of Civil Procedure 65(b), where the district court conducted a preliminary injunction hearing within the 20-day period and informed the parties at the close of the hearing that it was extending the TRO until it ruled on the preliminary injunction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 70 F.3d 1191. The opinion of the district court (Pet. App. 23-36) is reported at 887 F. Supp. 1521.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1995. A petition for rehearing was denied on February 15, 1996. Pet. App. 19-22. The petition for a writ of certiorari was filed on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Eleventh Circuit affirming the order of the United States District Court for the Southern District of Florida finding petitioner in civil contempt of a temporary restraining order entered in an enforcement action brought by the Securities and Exchange Commission.

1. On May 5, 1994, the Commission brought an enforcement action against Comcoa, Ltd., a/k/a Comcoa, Ltd., Inc., and its president, Thomas W. Berger (collectively, "defendants"), alleging that they violated antifraud and registration provisions of the federal securities laws in obtaining from investors nearly \$13.5 million by selling purported FCC licenses and falsely guaranteeing future profits from the investment. See Pet. App. 2; Complaint at 3-4. As relief, the Commission sought, among other things, a temporary restraining order, a freeze of Comcoa's assets, the appointment of a receiver for Comcoa, preliminary and permanent injunctions, and an accounting and disgorgement of ill-gotten gains, together with prejudgment interest and civil penalties. Petitioner was counsel for the defendants.

On May 6, 1994, the district court entered a temporary restraining order freezing the defendants' assets "pending determination of the Commission's Motion for a Preliminary Injunction." C.A. R.E., Tab 10, at 4. The court's order also appointed a temporary receiver for Comcoa's assets. At the time of entry of the May 6 Order, petitioner, as counsel for the defendants, held \$105,100.00 of Comcoa's funds in a firm trust account pursuant to a retainer agreement. The funds were placed in the account to pay for the

anticipated legal fees to be incurred in defending the Commission's enforcement action. Pet. App. 24.

On May 16-17, 1994, the district court held a hearing on the Commission's motion for a preliminary injunction. At the conclusion of the hearing, the district court informed the parties that the May 6 Order, and specifically the asset freeze, would remain in effect until the court ruled on all of the various pending motions, including the Commission's motion for a preliminary injunction.¹ The district court then asked if either party had anything further or any questions, to which petitioner replied, "No, sir." Pet. App. 3.

On June 3, 1994, the district court denied all of the defendants' pending motions, including their motions to dismiss and vacate the TRO. See Pet. 3. As part of that order, the district court also denied the defendants' motion to use the assets in the frozen Comcoa trust account maintained by petitioner to pay attorneys' fees and expert witness fees. C.A. R.E., Tab 54, at 11. Several days later, on June 7, 1994, the court entered a preliminary injunction *nunc pro tunc* as of June 3, 1994, enjoining the defendants from violating antifraud and registration provisions of the federal securities laws and continuing a freeze on the defendants' assets.

In the meantime, on June 6, 1994, petitioner, asserting that the May 6 Order had expired, demanded that the receiver return all of Comcoa's assets to Comcoa. When the receiver refused, petitioner filed a

¹ The motions at issue included those filed by defendants to dismiss for lack of subject matter jurisdiction, to vacate the TRO, and for the release of funds to pay attorneys' fees and expert witnesses. Pet. App. 3; C.A. R.E., Tab 54, at 11.

motion in the district court requesting an order directing the receiver to return all of Comcoa's assets. Petitioner, however, did not wait for the district court to rule on its motion. Instead, purportedly acting at the direction of Comcoa, petitioner on June 6 transferred \$91,500.00 out of the Comcoa trust account and into an operating account held by petitioner. The transfer was for the purpose of satisfying legal fees and expenses that the defendants owed petitioner for representing them in connection with the preliminary injunction proceedings. Pet. App. 3-4 & n.5, 25. Petitioner refused the receiver's subsequent demand for the return of the funds. C.A. R.E., Tab 73, Exh. D.

2. On August 11, 1994, the Commission moved the district court for an order to show cause why petitioner should not be held in contempt of the May 6 Order. In response, petitioner argued, *inter alia*, that it did not violate the May 6 Order by transferring the funds on June 6, 1994, because the order had expired by that date.² A show cause hearing was held

² Petitioner also argued that once the Commission filed its suit against Comcoa, title to the funds held in the trust account passed from the defendants to petitioner, pursuant to petitioner's retainer agreement with Comcoa. That agreement provided that funds in the trust account "become a minimum fee retainer upon an asset freezing action or order of civil penalty(ies) by any government, regulatory agency, and public or private party" and that the funds in the trust account will be "non-refundable." Deposition of Thomas Berger, Exh. 15, at 3. Therefore, petitioner claimed, those funds were never subject to the asset freeze. The district court rejected that argument. The court found that the retainer agreement between petitioner and Comcoa was against public policy and therefore void and unenforceable. Pet. App. 28-30. Petitioner did not seek review of that issue in the court of appeals.

on February 27, 1995, to determine whether petitioner should be held in contempt.

On March 13, 1995, the district court found petitioner in civil contempt. Pet. App. 22-36. The district court first concluded that the funds in the trust account that petitioner had transferred were subject to the May 6 Order freezing Comcoa's assets. *Id.* at 28-29. The district court further found that petitioner had consented to an extension of the May 6 Order until the district court rendered a decision on the Commission's motion for a preliminary injunction. *Id.* at 31-32. The court based its finding of consent on the fact that petitioner had not objected to the extension of the TRO until the court ruled on the pending motion, either at the conclusion of the preliminary injunction hearing or at any time thereafter. *Ibid.* Petitioner was ordered to remit the transferred funds, plus interest from the date of the demand by the receiver. *Id.* at 36.

3. On appeal, petitioner argued that under this Court's decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local No. 70*, 415 U.S. 423 (1974), it was entitled to treat the TRO as having expired. Petitioner contended that, under *Granny Goose*, a temporary restraining order expires after the 20-day time limit imposed by Fed. R. Civ. P. 65(b) unless a preliminary injunction containing findings of fact and conclusions of law is issued by the district court within that period. Petitioner also challenged the district court's finding that petitioner had agreed to an extension of the TRO.

The court of appeals affirmed the district court's order of contempt. Pet. App. 1-18. The court of appeals did not address whether the district court's finding that petitioner had consented to the extension

of the TRO was clearly erroneous. See *id.* at 5. Instead, it addressed the effect of an extension of a TRO, without consent, beyond the time allowed by Fed. R. Civ. P. 65. The court concluded that when the TRO was continued beyond the time permissible under Rule 65 it was to be treated as a preliminary injunction. Pet. App. 5-6 (citing *Sampson v. Murray*, 415 U.S. 61, 87 (1974)). The court reasoned that such treatment is "especially appropriate where, as in this case, there has been notice to the parties, a full hearing on a preliminary injunction, and then a stated and clear decision from the bench to extend the terms of the restraining order indefinitely, that is, until the court notified the parties otherwise." Pet. App. 5-6. The court of appeals distinguished this Court's decision in *Granny Goose*, explaining that *Granny Goose* addressed the distinct situation where no notice to the parties has been given and no hearing on the motion for a preliminary injunction had been held. Pet. App. 6 nn.7-8. Thus, the court of appeals concluded, "the proper course of conduct for [petitioner] was to treat the TRO as an erroneously granted preliminary injunction and to appeal." *Id.* at 6.

ARGUMENT

Petitioner violated the May 6, 1994, order when it transferred the funds in the Comcoa trust account to its own account despite the district court's express continuation of the May 6 order until it decided the Commission's motion for a preliminary injunction. Petitioner's subjective belief that it was entitled to ignore the district court's order based on its mistaken reading of *Granny Goose* does not insulate it from the consequences of that contemptuous conduct.

The decision below affirming the district court's finding of contempt is correct and does not conflict with any decision by this Court or any other court of appeals. Further review of this case is therefore unwarranted.

1. Petitioner contends that the court of appeals mistakenly refused to follow this Court's decision in *Granny Goose*. In petitioner's view, *Granny Goose* holds that "under Rule 65(b), where the restrained party has not consented to an extension of the TRO and no written preliminary injunction order has been issued by the district court, a party may 'reasonably assume' that no valid order exists and act accordingly." Pet. 8. Petitioner further claims that the court of appeals' conclusion that the TRO became an enforceable preliminary injunction "contradicts the plain language of Rule 65(b) and 'overrules' the holding of this Court in *Granny Goose*." Pet. 9. Petitioner's interpretation of *Granny Goose* and its characterization of the decision below are both mistaken.

a. *Granny Goose* does not support petitioner's argument that it cannot be held in contempt because it was entitled to treat the asset freeze order as having expired. Pet. 16. In *Granny Goose*, a temporary restraining order was entered by a state court enjoining strike activity, and the court issued an order to show cause why a preliminary injunction should not issue during the pendency of the suit. 415 U.S. at 428. Prior to the hearing date for the order to show cause, the defendants removed the action to federal court. *Ibid.* No preliminary injunction hearing was ever held in the federal court and the labor unrest apparently dissipated. *Id.* at 428-429. Several months later, the strike activity began again and the

union defendants, despite their argument that the TRO had long since expired, were found in contempt of the TRO by the district court. *Id.* at 429-430.

This Court held that, because the TRO was no longer in existence at the time of the alleged contempt, the district court's contempt ruling could not stand. The Court first noted that the TRO had expired by its own terms months before the date of the alleged contempt. 415 U.S. at 431-433. See also *id.* at 434-440 (rejecting argument that 28 U.S.C. 1450 had the effect of extending the time of the TRO indefinitely). The Court also held that the TRO could not be treated as a preliminary injunction. 415 U.S. at 440-444. The Court emphasized that there had been no hearing on whether to issue a preliminary injunction, *id.* at 442, and that the parties had not received "fair and precisely drawn notice of" the extension of the TRO, *id.* at 444. Accordingly, the Court concluded that there was no injunction in effect at the time of the allegedly contemptuous conduct.

As the court of appeals recognized, *Granny Goose* applies to situations, unlike here, in which there has been no notice to the parties and no hearing on a preliminary injunction. Pet. App. 6 nn.7-8. In those circumstances, a party has "no reason to believe," 415 U.S. at 423, that the restraint on its conduct has been extended, and the party therefore "may reasonably assume that the order has expired within the time limits imposed by Rule 65(b)." *Id.* at 445. In this case, however, the hearing on the Commission's motion for a preliminary injunction was held within the 20-day period for a TRO under Fed. R. Civ. P. 65, and all parties had notice that the district court was extending the status quo at that time. Accordingly, the court of appeals correctly held (Pet. App. 5-6) that

the TRO freezing Comcoa's assets did not merely expire at the end of the 20-day period, but instead became, in effect, a preliminary injunction. That ruling does not conflict with this Court's decision in *Granny Goose*.³

b. As this Court held in *Sampson*, where a temporary restraining order is extended beyond the periods permitted under Rule 65(b), it is immediately appealable as a preliminary injunction. 415 U.S. at 86-88.⁴ Thus, even if petitioner did not consent to the

³ Judge Hill's concurrence (Pet. App. 8-18) does not support petitioner's argument. Judge Hill did not agree with the majority's view that "[f]or [petitioner] just to disregard the district court's order based on his personal belief that it was invalid, is conduct that warrants a determination of contempt." *Id.* at 12. He nevertheless noted that this case was controlled by this Court's decision in *Sampson v. Murray* "that the indefinite extension of a TRO not only transforms the TRO into a preliminary injunction for purposes of appeal, but also into a valid injunction." *Id.* at 17.

⁴ See also *SEC v. Unifund SAL*, 910 F.2d 1028, 1035 (2d Cir. 1990) (invalidity of extension of TRO caused it to "technically qualify as a preliminary injunction," which would entitle the enjoined party to appeal that order); *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) ("a temporary restraining order continued without consent of the parties beyond the twenty day maximum may be treated as a preliminary injunction"); *Clements Wire & Mfg. Co., v. NLRB*, 589 F.2d 894, 896 (5th Cir. 1979) (where district court had entered a temporary restraining order that had no date of expiration, the district court had issued a preliminary injunction that was an appealable order); *Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962) ("[T]he continuation of the temporary restraining order beyond the period of statutory authorization having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. 1292(a)(1).").

extension of the May 6 Order—and even if petitioner believed that extension to be inappropriate—petitioner's proper course was to challenge the district court's action on appeal, not simply to defy the court's order.

Petitioner claims that even if an extended TRO is appealable, the court of appeals should review the order only for the purpose of holding it invalid *per se* because it does not contain the requisite findings to support a preliminary injunction under Fed. R. Civ. P. 52(a). Pet. 12-13 (citing *Sampson v. Murray*, 415 U.S. at 99 (Marshall, J., dissenting)). In petitioner's view, because the injunction would have been held invalid had it been appealed, petitioner cannot be held in contempt for violating it.⁵

This Court in *Sampson* squarely rejected that argument. The *Sampson* Court specifically noted that, even though the district court did not comply with Rule 52(a) in entering the preliminary injunction in that case, "we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief." 415 U.S.

⁵Petitioner's suggestion (Pet. 13) that the court of appeals would have vacated the TRO pursuant to Rule 52(a) is mere speculation. A preliminary injunction hearing had been held, the defendants testified, and the district court had denied all of the defendants' motions (including their motions to dismiss and for use of frozen funds for attorneys' fees) prior to the date by which petitioner claims the TRO had expired. Review of the district court record by the court of appeals would have demonstrated the Commission's entitlement to a preliminary injunction. In any event, petitioner has not argued that the injunction was improper, only that it expired before petitioner transferred the frozen funds.

at 87 n.58. The Court went on to determine whether the injunction was justifiable on its merits, and concluded that it was not. *Id.* at 88-91. As the court below recognized, "[n]o good reason exists to limit [the *Sampson*] rule to one of appellate jurisdiction only: a preliminary injunction is a preliminary injunction." Pet. App. 6 n.8.

When petitioner transferred the funds from the trust account to its operating account, it had available a choice of adequate non-contemptuous remedies, such as pursuing appellate review under 28 U.S.C. 1292(a)(1), or seeking clarification or instructions from the district court as to the status of the May 6 Order. Petitioner could not, however, merely disobey the district court's order, which the court had quite clearly extended. As this Court has often recognized, "[i]t is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn." *W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983). As the court below observed (Pet. App. 7):

We believe the instances when lawyers can be told by the district court in no uncertain terms not to do "X" and, yet, the lawyer can go on to do "X" with impunity are (and ought to be) few and far between, especially where the appellate courts—as in this case—are open to the lawyer to settle the matter in an orderly way, but the lawyer pursues no appeal. In these circumstances, for [petitioner] just to disregard the district court's clear order, based on his personal belief that it was invalid, was not merely bold; it was bad. We

conclude his conduct warrants a determination of contempt. The district court was within its discretion to hold [petitioner] in contempt of court for violating the order.

2. Finally, petitioner's claim must also be rejected because, as the district court found (Pet. App. 31-32), petitioner consented to the extension of the TRO past the 20-day limit. Federal Rule of Civil Procedure 65(b) provides that a TRO may be extended for longer than a 20-day period if the restrained party consents. The district court's finding that petitioner consented is thus sufficient by itself to establish that a valid TRO remained in effect at the time petitioner transferred the funds out of the trust account. It therefore is also sufficient to support the district court's order holding petitioner in contempt for taking that action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

RICHARD H. WALKER
General Counsel
PAUL GONSON
Solicitor
RICHARD M. HUMES
Associate General Counsel
LAURA S. PRUITT
Senior Counsel
Securities and Exchange
Commission